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Erica Inc., General Partner d/b/a Foodbasket Partners, Limited Partnership *and* United Food and Commercial Workers International Union Local No. 1564, AFL–CIO. Case 28–CA–17521

June 3, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On October 11, 2002, Administrative Law Judge Albert A. Metz issued the attached decision. The Respondent filed exceptions. The General Counsel filed limited exceptions and a supporting brief, as well as an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Erica, Inc., General Partner d/b/a Foodbasket Partners, Limited Partnership, Truth or Consequences, New Mexico, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. June 3, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[1] We agree with the judge that Head Clerk Sara Crouse and Produce Manager Ruben Lucero were appropriately included in the Respondent's Truth or Consequences store's retail unit on September 12, 2001, the date that the Respondent received the Union's demand for recognition and bargaining. Thus, the former predecessor's employees constituted a majority of the unit employees, whether or not Courtesy Clerk Brandi Yniquez is counted as a former employee of the predecessor. We therefore find it unnecessary to pass on Yniquez's status.

[2] The General Counsel excepts to the judge's failure to order the Respondent, as a successor, to rescind any changes in the terms and conditions of employment of the unit employees, made after September 12, 2001, and to make unit employees whole for any losses which the employees incurred as a result of such changes. Because there is no evidence that the Respondent unilaterally changed terms and conditions of employment, the General Counsel's exception is without merit under the authority of *Smith & Johnson Construction Co.*, 324 NLRB 970 (1997). Member Liebman agrees that *Smith & Johnson Construction* is on point, although she has misgivings about its correctness, as discussed by the dissenting opinion in that case (absence of evidence of unilateral changes in no way affects the successor's legal obligation to restore the status quo ante or the Board's obligation to include such a provision in its order).

Mitchell S. Rubin, Esq., for the General Counsel.
John A. Ferguson Jr., Esq., for the Respondent.
Angela B. Cornell, Esq., for the Charging Party Union.

DECISION[1]

ALBERT A. METZ, Administrative Law Judge. The issue presented is whether the Respondent is a successor employer who has refused to recognize and bargain with the Charging Party Union in violation of Section 8(a)(1) and (5) of the National Labor Relations Act (Act).[2] On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the parties' briefs, I make the following findings of fact.

I. JURISDICTION AND LABOR ORGANIZATION

The Respondent operates grocery stores in Truth or Consequences (herein TC) and Hobbs, New Mexico. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE UNION'S REPRESENTATION OF FURR'S SUPERMARKET EMPLOYEES

The Union has historically represented employees at Furr's Supermarkets, Inc., in the State of New Mexico. The Union has bargained on behalf of the retail and meat department employees at the Furr's Hobbs store since 1997 and at Furr's TC store since 1991.

The Union and Furr's were parties to several collective-bargaining agreements with effective dates between November 1, 1998 to October 27, 2001, which covered bargaining units of employees at several locations in New Mexico, including:

1. A retail bargaining unit of employees at various Furr's stores in the State of New Mexico, including the Furr's store in Hobbs.
2. A retail bargaining unit of employees at various Furr's stores in the State of New Mexico, including the Furr's store in TC.
3. Meat unit employees at various New Mexico stores including TC and Hobbs.

The collective-bargaining agreements for the retail units at both Hobbs and TC set forth the following appropriate unit:

> All employees working at the specified locations "who are engaged in handling or selling merchandise, or performing

[1] This case was heard at Truth or Consequences, New Mexico, on April 17–19 and May 7, 2002. All dates in this decision refer to the year 2001 unless otherwise stated.

[2] 29 U.S.C. § 158 (a)(1) and (5).

other services incidental thereto;" but excluding overall store director, assistant store managers, all employees working exclusively in the meat department, professional employees and supervisors within the meaning of the Act as amended.

The meat unit was a multistore contract that included Hobbs and TC. The unit description for the meat units was:

> All employees who are engaged in the retail and wholesale distribution of all fresh meats and all other meat products, including rabbits, fish and domestic fowls of all kinds, regardless of their origin, and all other products historically processed and handled by the meat department.

III. FURR'S BANKRUPTCY AND RESPONDENT'S PURCHASE OF THE TC AND HOBBS STORES

In February 2001, Furr's filed for Chapter 11 bankruptcy for its operations that included the TC and Hobbs stores. Fleming Foods was a creditor of Furr's and eventually agreed to purchase certain Furr's stores by means of an asset purchase agreement. On June 25, Furr's and Fleming entered an asset purchase agreement in which Fleming essentially was buying everything of Furr's. On July 27, the Respondent and Fleming signed a "Store Purchase Agreement" that memorialized the Respondent's purchase of six Furr's stores including the TC and Hobbs locations. Furr's operated these stores until August 30, 2001, at which time all of its employees were terminated and the stores closed for 1 day. The Respondent assumed ownership of the stores at that time, hired many of the former Furr's, Hobbs, and TC employees and opened the stores for business on September 1, 2001.

Respondent's attorney, Joe Harris, testified that he was asked in early July to review the Furr's-Fleming asset purchase agreement and render an opinion as to whether by signing that agreement the Respondent would be assuming the collective-bargaining agreements between Furr's and the Union. The asset purchase agreement reviewed by Harris contains the following section:

> Article V
>
> Section 5.1 Representation and Warranties of Seller. Seller [Furr's] hereby represents to Purchaser [Fleming] as follows:
>
> (g) Labor Matters. Except as set forth on Schedule 5.1g, (i) seller is not bound by any collective agreements or other labor Union contract applicable to persons employed by seller; . . . . [R. Exh. 6 "Plaintiff's Exhibit A" at pp. 21 and 25).

Schedule 5.1(g) of the asset purchase agreement listed collective-bargaining agreements for a retail unit including the Hobbs store, a retail unit including the TC store, and a meat unit including Hobbs and TC. Each of the three agreements had the same October 27, 2001 expiration date.

IV. THE BANKRUPTCY COURT'S JULY 3 ORDER

On July 3, the Bankruptcy Court entered its Order in the Furr's Supermarkets proceedings approving the asset agreement with Fleming Companies, Inc., authorizing the sale of all or substantially all of the debtors operating assets and transactions contemplated by the asset purchase agreement, and granting related relief.

In its July 3 Order the Bankruptcy Court stated:

> Except as expressly set forth in the Asset Purchase Agreement, the (i) transfer of the Purchased Assets to Fleming, or the Third Party Purchasers, as the case may be, and (ii) assumption and assignment to Fleming, or the Third Party Purchasers, as the case may be, of the Purchased Contracts, if any, and the assumption of the Assumed Liabilities do not and will not subject any of Fleming or the Third Party Purchasers to any liability by reason of such transfer under (i) the laws of the United States, any state, territory or possession thereof, based in whole or in part, directly or indirectly, including without limitation, any theory of antitrust, environmental, successorship or transferee liability, labor law, de facto merger, or substantial continuity, or (ii) any employment contract, understanding or agreements, including without limitation collective bargaining agreements, employee pension plans, or employee welfare benefit plans. As set forth in the Asset Purchase Agreement, neither Fleming nor any Third Party Purchasers is assuming any of the Debtor's obligations to its employees (including without limitation any obligation under the Debtor's collective bargaining agreements) (R. Exh. 6, p. 7).

The Union had not entered an appearance in the bankruptcy proceedings as of the date of the July 3 Order and it was not shown to have received notice of that Order. On August 29, Michael D. Four of the law firm of Schwartz, Steinsapir, Dohrmann & Sommers, Los Angeles, California, in association with the local union counsel filed an appearance in the Furr's bankruptcy proceeding on behalf of the Union.

The United Food and Commercial Workers International Union, AFL–CIO, CLC (the International) was represented on the unsecured creditors committee commencing in about February. In approximately July, the International Union withdrew from participation in the committee in order to devote its efforts to finding a buyer for the stores. At no time did Furr's seek to set aside any of the collective-bargaining agreements covering the units in contention in this case.

The Respondent argues that the July 3 Bankruptcy Court Order relieving a purchaser from any successorship liability had the effect of sheltering it from any bargaining obligations under the Act. The Government takes the position that under established labor law successorship principles the court's Order did not buffer the Respondent from its obligations to recognize and bargain with the Union.

When the employer takes over a business whose employees are represented by a labor organization, hires a majority of the prior employer's employees, and continues in effect the same basic operation, that new employer has a duty to bargain with its employees' collective-bargaining representative. *NLRB v. Burns Security Service*, 406 U.S. 272, 281 (1972); *Fall River Dyeing & Finishing Corp.*, 482 U.S. 27 (1987). This mandate applies equally when the new owner purchases the business as an outgrowth of a bankruptcy proceeding. *Nephi Rubber Products Corp*., 303 NLRB 151, 153 (1991), enfd. 976 F.2d 1361 (10th Cir. 1992); *Bellingham Frozen Foods v. NLRB*, 626 F.2d 674 (9th Cir. 1980); *Jersey Juniors, Inc*., 230 NLRB 329, 332–333 (1977).

The court in *Goodman*, 873 F.2d 598, 602–603 (2d Cir. 1989), found that the Board has principal responsibility to resolve labor successorship issues:

> The NLRB has primary jurisdiction over activity that is arguably subject to Sections 7 and 8 of the NLRA. Federal courts must defer to the exclusive competence of the Board to adjudicate such claims. See *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245 [ ] (1959). Whether a new employer is an alter ego of, or a successor to, an earlier employer for purposes of liability under the NLRA is a question of substantive federal labor law. The Labor Board has expertise in adjudicating successorship issues, and there is an interest in having uniform determinations by a single agency. See *Aquabrom v. NLRB*, 746 F.2d 334, 336 (6th Cir.1984); *Computer Sciences Corp. v. NLRB*, 677 F.2d 804, 807–808 (11th Cir. 1982). Thus, the question of successorship normally falls within the Labor Board's primary jurisdiction. See *In re Bel Air Chateau Hospital, Inc.*, 611 F.2d 1248, 1251 (9th Cir.1979).

See also *In re Carib-Inn of San Juan Corp.*, 905 F.2d 561, 562 (1st Cir. 1990) (Board has exclusive jurisdiction to determine the merits of the case, as "[t]he [Board's] complaint . . . is directed solely at [respondent successor] and seeks no remedy against the bankruptcy estate.").

Successorship obligations are, as the cases teach, within the Board's jurisdiction. The bankruptcy code is designed to extinguish liabilities and obligations incurred prior to the sale of the bankrupt entity's assets. The Respondent's subsequent third party purchase of assets from Fleming does not qualify as such a liability. *Ninth Ave. Remedial Group v. Allis-Chalmers Corp.*, 195 B.R. 716, 731 (N.D. Ind. 1996) ("a sale free and clear does not include future claims that did not arise until after the bankruptcy proceedings concluded."). A successorship obligation under the Act is determined by the number of the predecessor employees hired and the substantial continuity between the enterprises, as measured by the degree of similarity in the nature of the business, the extent to which employees of the new company perform the same jobs under the same employment conditions and supervision, and the degree of similarity between the products or services offered, the production process, and the customers. *Fall River Dyeing & Finishing Corp.*, 482 U.S. 27, 43, 46–47 (1987); *NLRB v. Burns Security Service*, supra. The court in *Fall River* explained that "to a substantial extent" the application of successorship obligations is in the hands of the purchaser of a business: "If the new employer makes a conscious decision to maintain generally the same business and to hire a majority of its employees from the predecessor, then the bargaining obligation of § 8(a)(5) is activated." Id. at 41.

The present case centers on the Respondent's bargaining obligation under the Act after it acquired assets owned by Fleming. I find that the Respondent has failed to demonstrate that it is not possible to interpret the Bankruptcy Court's Order harmoniously with the mandates of the Act. *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (When two statutes are capable of coexistence, it is the duty of the courts to regard each as effective, absent a clear expression of congressional intent to the contrary.). In light of the Supreme Court's decisions concerning successorship principles and the other cited authority for the Board's primacy in determining successorship obligations, I conclude that the Bankruptcy Court's July 3 Order does not insulate the Respondent from the Act's successorship requirements. *NLRB v. Horizons Hotel*, 49 F.3d 795 (1st Cir. 1995), enfg. 312 NLRB 1212 (1993); *In re Carib-Inn of San Juan Corp.*, 905 F.2d 561, 562 (1st Cir. 1990).

V. THE UNION'S REQUEST FOR RECOGNITION AND BARGAINING

On September 6, the Union's president, Diane Kimberle, mailed a certified letter to the Respondent's president, Raymond Schalek, requesting that the Respondent recognize and bargain with the Union. Kimberle's letter made the following points:

1. The Union had learned that the Respondent had acquired the Furr's, Hobbs, and TC stores.
2. That the Respondent had employed a majority of the former Furr's employees at each of these locations, and that a majority of the present employees at each location are former Furr's employees.
3. "Furr's has been and remains signatory to a collective bargaining agreement with [the Union] which covered each of the locations above, as well as all other Furr's locations in New Mexico. It is the position of [the Union] that there is a substantial continuity of enterprise by virtue of, among other factors, [the Respondent's] employment of a substantial representative complement of employees for the purpose of carrying on essentially the same operation, and the [the Respondent] is the labor law successor of Furr's Supermarkets, Inc. [The Union] therefore demands that [the Respondent] recognize [the Union] as the bargaining agent for its employees and promptly begin collective bargaining with [the Union] regarding wages, hours and other terms and conditions of employment for these employees."
4. "Please let me hear from you promptly so that we can set a date for a first bargaining session, and please do not hesitate to call or write if I can answer any questions or otherwise be of assistance." (GC Exh. 8.)

The return receipt for Kimberle's certified letter states the Respondent received it on September 12. The Respondent's attorney, Joe Harris, testified that he asked his client about receiving the September 6 demand letter. Schalek told him that "something had been received . . . and he couldn't locate it." Schalek never responded to the September 6 letter. I find that the Respondent did receive the Union's September 6 letter on September 12. I further find that the Respondent ignored this communication and did not question the Union's demand or seek any clarification of the September 6 letter until after the Union filed unfair labor practice charges against the Respondent on October 18.

There was disputed testimony from witnesses for both parties regarding Kimberle's alleged receipt of a letter from the Respondent's attorney, Joe Harris, around October 18. The Union's witnesses testified that this letter had been misplaced and it was not introduced into evidence. In sum, these witnesses believed that the letter stated the Respondent's refusal to bargain with the Union. Harris testified that he never sent such a letter. I found Harris' demeanor and credibility to be persuasive. I find that the Union's witnesses were mistaken about the alleged October 18 letter and that the Respondent did not communicate with the Union concerning its demand for bargaining at that time.

I find that the first time the Respondent did communicate with the Union was after the Union filed its unfair labor practice charges. This first contact was in the form of an October 22 letter that Harris wrote to the Union's attorney, Angela Cornell. Harris' letter asked for certain information regarding the Union's demand for bargaining. Harris requested copies of the Union's demand for recognition and bargaining with respect to the Hobbs and TC stores and the "the former collective bargaining agreement or agreements between UFCW Local 1564 and Furr's covering its stores in Hobbs and Truth or Consequences."

Cornell telephoned Harris to discuss his October 22 letter. She told him that she would provide him the documents he requested. Harris asked Cornell to just provide him with the recognition sections from the pertinent collective-bargaining agreements and noted that he did not need a copy of the Union's demand letter as he had received a copy from the NLRB.

On November 16, Cornell faxed Harris the first two pages for the TC retail agreement and the Hobbs retail agreement that contained the recognition section. That section stated, in part, that Furr's "recognizes the Union as the exclusive Collective Bargaining Representative for all employees working for the Employer in the State of New Mexico in the bargaining units set forth in Appendix C, who are engaged in handling or selling merchandise . . . ." The fax did not include appendix C of the Hobbs retail agreement. Cornell also faxed Harris the first page of a draft of the meat unit collective-bargaining agreement that included sections entitled "Recognition of the Union." This meat unit draft page referred to separate meat department bargaining units at Furr's stores located in various cities, including Hobbs. The listing, however, did not include the TC store. Cornell subsequently realized that omission and faxed Harris the first page of the meat unit agreement that listed the TC meat unit.

On November 16, Harris sent Cornell a letter acknowledging receipt of her fax. Harris's letter noted that that while he still had "some questions regarding a few categories, e.g., produce manager, deli manager, and office clerical employees," the categories were "too few in number to affect the disposition" of the issue before Respondent and the Union. Harris declared that Respondent was declining the Union's recognition demand because whether employees in these classifications are included or excluded at the Hobbs and TC stores, or both stores combined, former Furr's employees do not constitute a majority of employees "employed in either bargaining unit." Harris' October 22 and November 16 letters did not express any confusion about the units for which the Union was seeking recognition and bargaining.

Harris testified that during the course of the investigation of this case he sent NLRB Field Examiner Ed Lopez copies of his and Cornell's November 16 exchange of correspondence. Lopez informed Harris that the Union's faxed information did not correspond with the Union's claim to the Region. Harris testified that to clarify the matter he sent a letter to Cornell on December 3 and, for the first time, asked the Union to "clarify the unit or units in which Local 1564 is seeking recognition." Harris wrote that while Respondent had declined the Union's recognition demand in his November 16 letter, Respondent was "hereby suspend[ing] that declination of recognition until [Harris] underst[ood] the unit or units in which Local 1564 is seeking recognition." Harris stated that the Union's September 6 letter "would appear to request recognition in a store-wide unit at Hobbs and Truth or Consequences, or at both locations combined," but that the three unit descriptions sent him did not indicate storewide units because both "the New Mexico" and the TC agreements excluded meat department employees, and "[t]he Hobbs agreement is limited to meat market employees only." Harris added that he had not received appendix C to the New Mexico agreement and wanted to know if appendix C listed Hobbs. Harris concluded his letter by asking the Union to clarify the units for which it was seeking recognition and requested that the Union send him appendix C.

Cornell replied to Harris' request for clarification in a letter dated December 6. Cornell explained, "Virtually all of the employees in the Hobbs and Truth or Consequences stores, excluding those statutorily ineligible, were organized into bargaining units per store: retail and meat. The Union is seeking recognition in the same units for which it has previous[ly] represented these employees." Cornell attached to her letter the first page of the final version of the meat agreement (which included a description of both the TC and the Hobbs meat units), as well as appendix C of the Hobbs retail collective-bargaining agreement. Cornell concluded her letter by asking Harris to promptly clarify whether Respondent was willing to negotiate with the Union.

On December 13, Harris sent a letter to Cornell. His letter stated that the Respondent was declining the Union's recognition demand because "former Furr's employees do not constitute a majority of the employees in any of the bargaining units" requested by the Union.

The Respondent argues that it did not employ a representative full complement of employees until December 6. It contends that the former employees of Furr's did not compose a majority of the Respondent's employees as of that date in each of the units the Union seeks. The Respondent also argues that the Union made no valid claim for recognition until December 6 because it was at that time the Union finally clarified the units it was seeking to represent. The Respondent's brief cites the following in support of that argument:

> First, even though successorship status and a representative complement may have occurred earlier, the obligation to recognize the Union is based upon conditions as they exist at the time of the Union's (valid) demand. "But where no (valid) demand is made until sometime after successorship and representative complement have occurred, the obligation will rise and fall depending on the Union's representation among the unit employees at the time of its demand. *Royal Midtown Chrysler-Plymouth, Inc*., 296 NLRB 1039, 1040 (1989).

The Respondent's second point is that the December 6 date is concordant with Board precedent stating that "when a new employer expects, with a reasonable certainty, to increase its employee complement substantially within a relatively short time, it is appropriate to delay determining the bargaining obligation for that short period." *Myers Custom Products*, 278 NLRB 636, 637 (1986).

The Respondent contends that the "Union's September 6, 2001 demand letter was hopelessly vague and ambiguous and did not give Food Basket any sort of definitive notice regarding the nature of the bargaining units sought."

VI. ANALYSIS OF THE UNION'S SEPTEMBER 12 DEMAND FOR RECOGNITION AND BARGAINING

The Respondent offers no explanation why it did not respond to the Union's September 6 demand letter. If the Respondent had questions concerning the demand it could have punctually brought those to the attention of the Union. Kimberle's letter made a point of inviting any questions and urged a prompt reply from the Respondent. The Respondent had garnered knowledge from the asset purchase agreement that the Union represented various units of Furr's employees including the retail and meat units at Hobbs and TC. These units were covered by collective-bargaining agreements that were effective through October 27, 2001. The Respondent's store managers at Hobbs and TC were holdovers from Furr's and also had knowledge of the retail and meat units. The Respondent ignored the Union's September 6 letter and failed to raise any question concerning the Union's demand for recognition and bargaining until after the charge was filed a month and a half later. I find that the Respondent's conscious disregard of the September 6 demand letter was an unsubtle attempt to avoid bargaining with the Union. I conclude that the Union's September 6 demand was legally sufficient. *Hydrolines, Inc*., 305 NLRB 416, 419–420 (1991); *RTW Industries*, 296 NLRB 910, 911–912 (1989).

VII. SUBSTANTIAL CONTINUITY

In *NLRB v. Burns International Security Serv.*, 406 U.S. 272 (1972), the Supreme Court set forth the criteria for determining whether a new employer is the successor to the prior employing entity. The approach is primarily factual and is based on the totality of the circumstances presented by each case. The Court instructed that the analytical focus should be upon whether there is "substantial continuity" between the enterprises, and whether a majority of the new employer's employees had been employed by the predecessor. The Court held that when one employer takes over the union represented bargaining unit employees of another employer, it is bound to recognize the union as the collective-bargaining representative of the employees in the unit.

The Supreme Court revisited the successorship issue in *Fall River Dyeing & Finishing Corp.*, 482 U.S. 27 (1987), where it reiterated the requirement that a "substantial continuity" must exist between the enterprises before warranting a finding that the new employer is a successor. The Supreme Court in *Fall River*, supra at 43, summarized the factors relevant to determining when substantial continuity exists as follows:

> [W]hether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers.

The Court also stated that the Board would analyze these factors primarily from the perspective of the employees, i.e., "whether 'those employees who have been retained will view their job situations as essentially unaltered.'" Id., quoting *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 184 (1973). The Court reiterated that although each factor must be analyzed separately they must not be viewed in isolation and, ultimately, it is the totality of the circumstances that is determinative.

Prior to September 1, 2001, Furr's operated the Hobbs and TC stores as grocery markets. On September 1, 2001, the Respondent commenced operations at these stores and operates them as grocery markets, offering the same services to the public, and hiring many of the same employees of the predecessor. The customer base for the stores remained the same. The employees working at the various job classifications at both stores were basically doing the same jobs as employees in those job classifications had formerly performed at both Furr's stores. The employees at both stores were supervised by at least some of the same supervision after September 1. At the TC supermarket, Director Abel Hinson, Assistant Store Director David Frietze, and Customer Service Manager Roberto Chavez held similar positions for Furr's and the Respondent. The same situation existed at the Hobbs store where Store Director Eddie Granado, Assistant Store Director Jesse Marquez, and Customer Service Manager Sharon Lewis each worked at similar supervisory positions for Furr's. The Union had represented the former Furr's retail and meat employees hired by the Respondent. From the perspective of the Respondent's employees, there is no difference in their job situation. I, therefore, find that there was substantial continuity between the two employing enterprises.

VIII. RESPONDENT'S HIRING PLANS

Respondent's President Schalek met shortly before September 1 with Hinson, told him he would be employed to manage the TC store, and that he should continue the store's operation with a minimum of disruption. Schalek also told Hinson to hire whatever TC store employees he wanted to work for the Respondent. Hinson testified that he determined to hire the number of employees that could the run the store at the time the Respondent started operations. Beyond that he would make further hiring decisions based upon need as dictated by sales.

Hobbs store manager, Eddie Granado, testified that there was a similar situation regarding hiring at his store. He would hire a minimum amount of employees to keep the store going and then would determine if other hires were subsequently needed based upon sales. Granado testified that there was no set number of employees that he intended to hire to eventually run the store. I find that the record establishes that the Respondent had no reasonably certain hiring plans, other than the initial work force, for its operations at the Hobbs and TC stores.

IX. SUBSTANTIAL AND REPRESENTATIVE COMPLEMENT

In *Fall River*, the Supreme Court explained that in deciding whether a "substantial and representative complement" exists, the Board examined a number of factors including: (1) whether the job classifications designated for the operation were occupied or substantially filled; (2) whether the operation was in normal or substantially normal production; (3) the size of the complement on the date of normal or substantially normal production; (4) the time expected before a substantially larger complement would be at work; and (5) the relative certainty of the employer's expected expansion. Id. at 48.

The Hobbs and TC Furr's employees were interviewed for continued employment with the Respondent about a week before

September 1. They were notified of the hiring decisions shortly before the start up of the Respondent's operations at the stores. The two stores then commenced operations on a reasonably normal operation as compared to the Furr's operations.

Hinson testified that by September 11, the following TC positions were occupied or substantially occupied: (1) deli clerks; (2) bakery clerks; (3) grocery clerks; (4) produce clerks; (5) customer service managers; (6) nonfood managers; (7) head clerks; (8) assistant managers; (9) courtesy clerks; (10) cashiers; (11) deli clerks; (12) bakery clerks; (13) produce managers; (14) DSD receiving clerks; (15) dairy grocery clerks; (16) meat wrappers; (17) meat cutters; (18) video clerks; (19) grocery clerks; and (20) nonfoods clerks. As of September 11, the Respondent employed 36 individuals (including supervisors and employees) at its TC store. By September 11, each of the positions Respondent needed to operate the TC store during its full operating hours were either occupied or substantially occupied. Hinson testified that the TC work force increased about 20 percent between September and the end of December because of the improvement in sales. Hinson testified that he was still continuing to staff the store after December. The Respondent employed 44 individuals (supervisors and employees) at its TC store as of December 8.

On September 11, the Respondent employed 33 persons at its Hobbs store. Granado testified that by the second week of September the Hobbs store's pharmacy, deli, bakery, produce, and meat departments were fully stocked with products, were in full operation or production, and were either fully or substantially staffed with employees. Granado hired more employees at the Hobbs store as sales increased until December, at which time he determined the store was fully staffed. As of December 8 the Hobbs store employed 42 individuals (including supervisors and employees). Granado noted that in February 2002, a Wal-Mart Super Center opened for business, a mile away from the Hobbs store. This competition resulted in his store losing approximately 35 percent of its business and the Respondent then reduced the number of Hobbs store employees.

The Respondent argues that as of September 12 a representative complement of employees was not employed in the four units. The Respondent was operating the stores for approximately 2 weeks by September 12. As related above the stores were stocked and staffed in all departments. The evidence demonstrates that the Respondent was uncertain of the number of employees that may be necessary to run the two stores. The Respondent's hiring outlook was based upon an evaluation of store sales. The Respondent admits it was uncertain when, if ever, sales might justify the hiring of additional employees. The Respondent's employment needs were contingent upon undeterminable future sales. I find that the Respondent's prospective hiring requirements were unknown to it on September 12, and thereafter as it continued a "wait and see" evaluation of sales to determine if any additional employees were needed. The Respondent established no time limitation or projection as to when any hiring decisions would be made or if any hiring would be substantial. *Delta Carbonate*, 307 NLRB 118, 118–119 (1992), enfd. 989 F.2d 486 (3d Cir. 1993) (employer's was not justified in delaying its recognition when its plans lacked any timetable and were dependent on the "vagaries" of new product development and "new customer cultivation;" the Board found that the employers plans "were not so certain in terms of timing and scope" as to warrant the delay). *General Wood Preservative Co*., 288 NLRB 956, 964 (1988), enfd. 905 F.2d 803 (4th Cir. 1990), cert. denied 498 U.S. 1016 (1990) (employer's request for later bargaining obligation determination date rejected because the employer's expected expansion "was highly uncertain"). I find that as of September 12, the Respondent did employ a substantial and representative complement of employees in the Hobbs and TC stores collective-bargaining units. I further find that September 12 is the appropriate date for determining the Respondent's successor bargaining obligations. *Fall River Dyeing & Finishing Corp.*, 482 U.S. 27, 47 (1987); *Sullivan Industries v. NLRB*, 957 F.2d 890, 897 (D.C. Cir. 1992), a "substantial and representative" complement need not constitute a majority of the "full complement" work force.)

X. THE UNION'S MAJORITY STATUS ON SEPTEMBER 12

A successor employer's bargaining obligation attaches when it has hired a "substantial and representative" complement of employees within the bargaining unit, a majority of which were employees of the predecessor. *Fall River*, supra.

A. TC Store

As of September 11 the Respondent employed 36 individuals at the TC store. The parties agree that four of these persons, Roberto Chavez, David Frietze, Abel Hinson, and Janet Romero are excluded as supervisors. Of the remaining 32 persons, 3 worked in the meat department.

1. TC meat unit

The Respondent contends that meat manager, Michael Hearn, should be excluded from the TC meat unit as a supervisor. The Government argues he was included in Furr's unit and should continue to be included in the unit under the Respondent. Hearn did not testify at the hearing.

On September 12 the Respondent employed three individuals in its TC meat department. These persons were head meat cutter, Michael Hearn, and employees Kathy Lujan and Lynn Rainwater. All of these individuals were TC Furr's employees and were included in the meat unit. I find it unnecessary to determine whether or not Hearn is a supervisor at present. I find that the Union represented a majority of the employees in the TC meat unit as of the pertinent September 12 date regardless of Hearn's alleged supervisory status.

2. TC retail unit

On September 11 there were 29 persons working in the TC store retail unit. The parties agree that 15 of these persons were former Furr's employees. The parties disagree on whether two of that number, Ruben Lucero and Sara Crouse should be included in the unit or counted in calculating the Union's majority status as of September 11. The parties also disagree on whether Brandi Yniquez is a former Furr's employee for purposes of establishing the Union's majority status.

a. Brandi Yniquez

The Respondent contends that Brandi Yniquez is not a former Furr's employee who should be counted as part of the Union's majority status as of the September 12 demand date. Yniquez formerly worked as a courtesy clerk at the TC Furr's store. In that capacity she was included in the retail bargaining unit. Yniquez

quit her employment at Furr's around July 1, 2001, at the time Furr's bankruptcy petition was pending.

The Respondent hired Yniquez to work as a courtesy clerk at its TC store around September 8, and she has continued in that capacity. I find Yniquez' short hiatus in employment is insufficient to preclude her being counted in determining former Furr's union-represented employees that were employed by the Respondent on September 11. *Derby Refining Co.*, 282 NLRB 1015, 1015–1016 (1989), enfd. 915 F.2d 1448 (10th Cir. 1990); *Mangold Markets*, 280 NLRB 773 (1986).

b. Ruben Lucero

The Respondent contends that Ruben Lucero is a supervisor and should be excluded from the retail unit at the TC store. Lucero did not testify at the hearing. Lucero was a produce manager in the Furr's TC retail bargaining unit. The collective-bargaining agreement for the retail employees states a wage rate for produce managers and the agreement's recognition clause excludes supervisors. Lucero was hired by the Respondent to be the produce manager at the TC store when it commenced operations on September 1. The Respondent offered TC Store Manager Hinson as its witness to establish Lucero's supervisory status. Hinson testified that Lucero had the authority to discipline employees, effectively recommend termination, and recommend pay raises. He offered no evidence as to the source of that authority or any examples where Lucero ever exercised this alleged authority.

In addition to Lucero there were two produce clerks working in that department. Their work appears to be of a routine nature in handling the produce. Lucero likewise spends most of his time stocking the department, removing spoiled product, and working with signage.

Section 2(11) of the Act defines the term "supervisor" as:

> The term supervisor means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

It is well settled that the possession of any one of the indicia of supervisory authority specified in Section 2(11) of the Act, provided such authority is exercised with independent judgment on behalf of management, is sufficient to confer supervisory status on an employee. *California Beverage Co.*, 283 NLRB 328 (1987). The burden of proving that an individual is a supervisor is on the party alleging that supervisory status exists. *Ferguson-Williams, Inc.*, 322 NLRB 695, 702, (1996); *Health Care Corp.*, 306 NLRB 63 fn. 1 (1992). Supervisory status is not determined by title or job classification, but by the nature of the individual's functions and authority in the workplace. *Mack's Supermarkets*, 288 NLRB 1082 (1988).

The Respondent produced no specifics as to Lucero's possession of supervisory authority. The record shows that Lucero spent most of his worktime performing the same work as the produce clerks. See *Williamson Piggly Wiggly*, 280 NLRB 1160, 1167 (1986), enfd. 827 F. 2d 1098 (6th Cir. 1987) (produce manager that spent most of his time performing physical tasks similar to produce clerks found not to be a be statutory supervisor); *Valley Mart Supermarkets*, 264 NLRB 156, 162–163 (1983) (produce manager, who made sure that work by two produce clerks was completed on time and performed the "clerical" function of scheduling employees on a daily basis schedule, not a statutory supervisor). Hinson's unsupported opinion testimony concerning Lucero's authority is simply insufficient to meet the Respondent's burden of establishing the produce manager's purported supervisory status. *Control Services*, 314 NLRB 421, 421 (1994) (conclusory testimony and lack of corroborating evidence insufficient to establish supervisory authority); *Sears, Roebuck & Co.*, 304 NLRB 193 (1991). I find that Lucero shall be included in the TC retail unit and counted as a former Furr's union represented employee.

c. Sara Crouse

The Respondent took the position at the hearing that the Respondent's TC Head Clerk Sara Crouse should be excluded from the retail unit because she was a confidential employee. Crouse worked for Furr's in the same position, was covered by the collective-bargaining agreement in that position and was hired on September 1 to work the same job for the Respondent.

Crouse duties are to distribute tills to cashiers, make loans of cash to them, pick-up the tills, and balance them out. She helps close up the store at night and will assist in the final counting of money upon the closing of the store. Crouse estimated that she spends 50–80 percent of her time relieving cashiers and covering in the video department.

A party asserting that an individual is a confidential employee bears the burden of proving that claim. *Crest Mark Packing Co.*, 283 NLRB 999, 999 (1987). The cases teach that workers are considered confidential employee only if they 1) "assist and act in a confidential capacity to persons who formulate, determine and effectuate management policies in the field of labor relations," or 2) the employees, "in the course of their duties, regularly have access to confidential information concerning anticipated changes which may result from collective-bargaining negotiations." *Inland Steel Co.*, 308 NLRB 868, 872 (1992); *Rural Electrical Membership Corp.*, 454 U.S. 170, 188–189 (1981). I find that the Respondent has not satisfied either of these tests with regard to Crouse. I conclude that she is not a confidential employee and should be considered in calculating the Union's majority status at the TC store retail unit. *Ernst & Ernst National Warehouse*, 228 NLRB 590, 591 (1977).

I find that 16 of the 29 individuals working for the Respondent on September 11 in the TC retail unit were former Furr's employees. I further find that based on those numbers the Union was the majority representative of the TC retail unit employees as of that date.

B. Hobbs Store

1. Hobbs retail unit

The parties agree that as of September 11, there are 22 employees who are properly included in the Hobbs retail unit. The parties disagree over the inclusion of the following four individuals in the Hobbs retail unit.

a. Barbara Garcia

The Respondent asserts that scanner and cashier, Barbara Garcia, should be excluded from the Hobbs retail unit as a confidential employee. The Respondent's brief does not discuss the issue. The Government contends she is not a confidential employee and should be included in that unit. Barbara Garcia did not testify at the hearing.

Barbara Garcia, the Hobbs store scanner, was responsible for insuring the integrity of the bar code pricing labels on products, changing shelf price tags, making signs, downloading or preparing advertisements, and changing prices in the computer. The Respondent considers pricing to be confidential. Store scan coordinators learn of the pricing of sale products before that information is made public in local paper advertisements. Backup scan coordinator, Heather Barbaree, and receiving clerk, Jean Hopper, were privy to the same information. The Respondent does not maintain that they should be excluded from the retail unit.

The Respondent bears the burden of establishing that Barbara Garcia is a confidential employee. As noted by the authority cited above, the Board has strict limitations on the exclusion of employees from representation because of their confidential work. I find that the Respondent has not met its burden of showing that Barbara Garcia's duties involve confidential work contemplated by the decisions of the Board and courts. I find that Barbara Garcia, a former Furr's employee, shall be included in the Hobbs retail unit for purposes of determining the Union's majority status.

b. Patricia Bruselas

Patricia Bruselas is the Hobbs deli manager. The Respondent maintains that she is a supervisor and should be excluded from the unit. The Government urges her inclusion. Barbara Bruselas did not testify at the hearing.

According to Store Manager Eddie Granado, Bruselas' deli manager duties involve keeping track of "purchases, all sales, all the upcoming ads, ordering, scheduling, [and] correct retailing." Bruselas prepares a work schedule for deli employees and has that approved by Granado. The Respondent failed to provide evidence of even one instance when Bruselas disciplined or recommended that an employee be disciplined. Granado testified that on one occasion Bruselas mentioned to him that an employee had some problems that needed to be addressed. She apparently did not recommend that the employee be disciplined. There was insufficient record evidence presented to determine if the work direction that Bruselas gave to deli employees was routine or required the use of independent judgment. In sum, the Respondent did not establish that Bruselas possessed or exercised any of the necessary supervisory powers described in Section 2(11) of the Act. I find that Bruselas, a former Furr's employee, has not been shown to be a supervisor and she should be counted in determining the Union's September 12 majority status in the Hobbs retail unit.

c. Juan Mares

The Respondent seeks to exclude Hobbs produce manager, Juan Mares, from the retail unit as a supervisor. The Respondent presented no evidence in support of that contention. Mares did not testify at the hearing. The party asserting supervisory status has the burden of establishing the facts to support such a finding. I find that Mares, a former Furr's employee, shall be included in the Hobbs retail unit and counted in determining the Union's majority status.

d. Theresa Garcia

Theresa Garcia is the Respondent's Hobbs store bakery manager. The Respondent takes the position that she should be excluded from the retail unit as a supervisor. Theresa Garcia did not testify at the hearing.

Granado testified that he was sure that Theresa Garcia formerly worked for the Hobbs Furr's store and that she was at that store when Granado arrived there about 4 months prior to September 1. I find that Theresa Garcia was a former Furr's employee at the Hobbs store.

The Respondent failed to present any evidence in support of its contention that Theresa Garcia was a statutory supervisor. Garcia was paid an hourly wage and hourly paid bakery managers were included in the Furr's Hobbs retail unit collective-bargaining agreement. I find that Theresa Garcia shall be counted in determining the Union's majority status in the Hobbs retail unit.

In sum, there were 26 employees working in the Hobbs retail unit as of September 11. Of that number 17 were former Furr's employees. I find, therefore, that the Union represented a majority of the Hobbs retail unit employees as of its September 12 demand for recognition and bargaining.

2. Hobbs meat unit

On September 12 the Respondent employed head meat cutter, Mauricio Jacobo, and employees Martin Florez and Junior Jacques in its Hobbs meat department. Each of these men was employed by Furr's at the Hobbs store and had been included in the meat unit.

The Respondent asserts that Jacobo is a statutory supervisor, and should not be included in the bargaining unit. The Government argues Jacobo is not a supervisor and is properly included in the unit. As a majority of the Hobbs meat unit employees were former Furr's employees as of the September 12 demand date, I find it unnecessary to make findings on whether or not Jacobo is a supervisor within the meaning of the Act. I find that the Union did represent a majority of the Hobbs meat unit employees on September 12.

In sum, the credited record testimony shows that as of September 11, 2001, a majority of the Respondent's employees in the meat and retail units at Hobbs and TC were former Furr's employees that had been covered by the Union's collective-bargaining agreements. As of September 12 the Respondent was a labor law successor employer to Furr's former employees, employed a substantial and representative complement of employees and the Union represented a majority of those former Furr's employees in the retail and meat units. Commencing on September 12 the Respondent refused to recognize and bargain with the Union pursuant to its demand letter received on that date. I find, therefore, that the Respondent unlawfully refused to recognize and bargain with the Union and that it violated Section 8(a)(1) and (5) of the Act by its refusal. I further find that an affirmative bargaining order is the appropriate remedy for the Respondent's unlawful refusal to bargain conduct. *Caterair International*, 322 NLRB 64, 68 (1996).

CONCLUSIONS OF LAW

1. Erica, Inc., General Partner d/b/a Foodbasket Partners, Limited Partnership, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The United Food and Commercial Workers International Union, Local No. 1564, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) and (5) of the Act.

4. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Erica, Inc., General Partner d/b/a Foodbasket Partners, Limited Partnership, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain with the United Food and Commercial Workers International Union, Local No. 1564, AFL–CIO.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the United Food and Commercial Workers International Union, Local No. 1564, AFL–CIO, as the exclusive collective-bargaining representative of the employees in the following appropriate units concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> 1. All employees working for the Respondent in Truth or Consequences, New Mexico, who are engaged in handling or selling merchandise, or performing other services incidental thereto; but excluding overall store director, assistant store managers, all employees working exclusively in the meat department, professional employees and supervisors within the meaning of the Act as amended.
>
> 2. All employees working for the Respondent in Hobbs, New Mexico, who are engaged in handling or selling merchandise, or performing other services incidental thereto; but excluding overall store director, assistant store managers, all employees working exclusively in the meat department, professional employees and supervisors within the meaning of the Act as amended.
>
> 3. All employees working for the Respondent in Hobbs and Truth or Consequences, New Mexico, who are engaged in the retail and wholesale distribution of all fresh meats and all other meat products, including rabbits, fish and domestic fowls of all kinds, regardless of their origin, and all other products historically processed and handled by the meat department.

(b) Within 14 days after service by the Region, post at its facilities in Truth or Consequences and Hobbs, New Mexico, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 12, 2001. *Excel Container, Inc.*, 325 NLRB 17 (1997).

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, San Francisco, CA October 11, 2002

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to recognize and bargain with the United Food and Commercial Workers International Union, Local No. 1564, AFL–CIO, as the collective-bargaining representative of our employees in the following appropriate units:

> 1. All employees working for us in Truth or Consequences, New Mexico, who are engaged in handling or selling merchandise, or performing other services incidental thereto; but excluding overall store director, assistant store managers, all employees working exclusively in the meat department, professional employees and supervisors within the meaning of the Act as amended;

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommend Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

2. All employees working for the us in Hobbs, New Mexico, who are engaged in handling or selling merchandise, or performing other services incidental thereto; but excluding overall store director, assistant store managers, all employees working exclusively in the meat department, professional employees and supervisors within the meaning of the Act as amended.

3. All employees working for us in Hobbs and Truth or Consequences, New Mexico, who are engaged in the retail and wholesale distribution of all fresh meats and all other meat products, including rabbits, fish and domestic fowls of all kinds, regardless of their origin, and all other products historically processed and handled by the meat department.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce you in the exercise of your rights stated above in Section 7 of the Act.

WE WILL NOT, on request, recognize and bargain in good faith with the Union as the exclusive collective-bargaining representative of our employees in the appropriate units set forth above concerning wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in signed agreements.

ERICA INC., GENERAL PARTNER D/B/A FOODBASKET PARTNERS, LIMITED PARTNERSHIP